TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 257

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
PETITIONER,

vs.

ALVIN R. DURHAM COMPANY AND FRED S. LARSON,
ALIAS FRED M. LARSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED JANUARY 26, 1925

CERTIORARI GRANTED MAY 25, 1925

(30,831)

(30,831)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 866

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, PETITIONER,

vs.

ALVIN R. DURHAM COMPANY AND FRED S. LARSON, ALIAS FRED M. LARSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

INDEX

	Original	Print
Proceedings in supreme court of Michigan	*a*	1
Clerk's certificate	*a*	1
Docket entries	1	1
Record from circuit court of Gogebic County	1	1
Bill of exceptions	3	2
Caption	3	2
Offers in evidence	4	2
Testimony of Fred S. Larson	7	4
Testimony of Brigham W. Shove	9	5
Verdict and judgment	10	5
Order settling bill of exceptions	10	5
Assignments of error	11	6
Exhibit 2 in Evidence—Order bill of lading	14	7
Exhibit 3 in Evidence—Judgment in case of Durham vs. Larson	16	9
Exhibit 4 in Evidence—Writ of garnishment	17	9
Demand for oral examination of garnishee	19	10
Stipulation re exhibits	21	11
Statement of garnishee	22	11
Testimony of Brigham W. Shove	24	13
Motion for a directed verdict	27	14
Order on motion for directed verdict	28	14
Judgment	28	15
Argument and submission	29	15
Opinion, Bird, J.	30	15
Judgment	32	16
Order allowing certiorari		16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 6, 1925

[fol. a] **IN SUPREME COURT OF MICHIGAN**

ALVIN R. DURHAM COMPANY, Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant and Appellant

CLERK'S CERTIFICATE

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all the proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Justices of said Court and filed in my office, as appears of record on file in said cause; that I have compared the same with the original and that it is a true transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing, this eighth day of January, in the year of our Lord, one thousand nine hundred and twenty-five.

Jay Mertz, Clerk. (Seal of the Supreme Court of Michigan.)

[fols. 1 & 2] IN SUPREME COURT OF MICHIGAN

[Title omitted]

DOCKET ENTRIES

Date	Proceedings
1924.	
May 28.	Præcipe filed and writ issued returnable June 30, 1924.
Jun. 2.	Proof of notice of writ filed.
Aug. 20.	Note of argument filed.
Sep. 5.	Return filed.
Dec. 3.	Argued and submitted.
Dec. 31.	Affirmed with costs.
1925.	
Jan. 5.	Remittitur to Court below.

[fol. 3] IN CIRCUIT OF GOGEBIC COUNTY

No. 31520

ALVIN R. DURHAM COMPANY, Plaintiff, Appellee,

v.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Garnishee Defendant, Appellant; Fred S. Larson, alias Fred M. Larson, Principal Defendant

I. Bill of Exceptions—Filed June 2, 1924

CAPTION

The issue in this case came on for trial in said court on the 23rd day of May, 1924, before the Honorable George O. Driscoll, circuit judge, and a jury, the plaintiff appearing by Solomon W. Patek, its attorney, with Julius J. Patek, of counsel, and the garnishee defendant, Chicago & Northwestern Railway Company, by Frank A. Bell, its attorney.

[fol. 4] OFFERS IN EVIDENCE

Plaintiff offered and there was introduced in evidence Plaintiff's Exhibit 1, a map or plat, showing the location of the public delivery track located northerly of the freight warehouse of the garnishee defendant; the track upon which the car was located at the time of the service of the writ of garnishment, and the relation of such track to the freight warehouse of the defendant, also the distance from the terminus to the first switch easterly of such warehouse.

It was thereupon stipulated that the track, testified to by Mr. Shove upon his former examination, and upon which the car of apples was located at the time of the service of the writ of garnishment, was one of the public delivery tracks of the defendant at said station used by consignees for unloading freight that was received in car lot shipments, and not in any manner connected with the north wall of the railway freight warehouse.

Plaintiff offered and there was received in evidence Plaintiff's Exhibit 2, the entire original bill of lading, including the conditions 5 and 10 on the back thereof being the conditions, referred to in the case of Michigan Central Railway Company v. Mark Owen & Company, decided by the supreme court of the United States, June 1, 1921, and that the bill of lading is the uniform form of order bill of lading.

It was thereupon further stipulated that the apples in dispute are [fol. 5] three-fourths of a carload of apples, and that the value of those three-quarters of a carload of apples was six hundred ($600.00) Dollars.

Plaintiff offered and there was received in evidence Plaintiff's Exhibit 3, the judgment in this court rendered in the principal suit of Alvin R. Durham Company, a corporation v. Fred S. Larson, alias Fred M. Larson, on the 30th day of November, 1921, appearing on Journal 8 of this court, page 103; total damages, $1,099.97; costs $25.10; this aggregating $1,125.07.

It was thereupon further stipulated that no notice was served on the garnishee defendant by Mr. Larson up to the present time of his intention to appeal from the judgment rendered against him or move for a new trial.

Plaintiff further offered and there was received in evidence Plaintiff's Exhibit 4, the files in the garnishment proceedings in this cause, including the original disclosure; also a stipulation as filed; and the statement filed constituting the oral examination of the garnishee in pursuance of notice heretofore given, being the examination had before the Honorable George O. Driscoll, circuit judge, at the city of Bessemer, at his chambers, on the 22nd day of October, 1921.

Plaintiff further offered and there was received in evidence all the acts of Congress and the tariffs, rules and regulations of the Interstate Commerce Commission in force on October 8, 10, 11 and 12, [fol. 6] relating to charges of demurrage, the collection any payment thereof, and the rules as to payments of such charges before removal of the property subject thereto, and the lien of the carrier upon such property for such charges and the right of the carrier to retain same until charges are paid, and especially demurrage tariff 4-A: Item 3, Rule 1, Sec. A; Item 4, Rule 2, Sec. A, subdivisions a and b; Item 5, Rule 3, Sec. B, and Item 9, Rule 7, Sec. A.

Item 3, Rule 1, Sec. A: "Cars of either railroad or private ownership, held for or by consignors or consignees for loading, unloading, forwarding directions or for any other purpose (including cars held for loading company material unless the loading is done by the railroad for which the material is intended and on its tracks) are subject to these demurrage rules, except as provided in Section B."

Item 4, Rule 2, Sec. A, subdivision a and b: Section A: "Forty-eight hours (two days) free time will be allowed for loading or unloading all commodities. (See rule 2, Section B, Paragraph 4)."

"Unloading" includes:

"(a) Surrender of bill of lading on shipments billed 'to order.'

(b) Payment of lawful freight charges when required prior to delivery of the car."

Item 5, Rule 3, Sec. B: "On cars held for orders, surrender of bill of lading or freight charges, whether such cars have been placed [fol. 7] in position to unload or not, time will be computed from the first 7:00 A. M. after the day on which notice of arrival is sent or given to the consignee or party entitled to receive same."

Item 9, Rule 7, Sec. A: "On cars not subject to Rule 9 (Average Agreement): After the expiration of free time allowed, the following charges per car per day, or fraction of a day, will be made until car is released:

For each of the first four days, $2.00.

For each succeeding day, $5.00."

It was thereupon further stipulated that no demurrage was charged and none was collected on the car in question, and that the car was a box car.

LARSON, FRED S., the principal defendant, was sworn on behalf of the plaintiff and testified as follows:

Direct examination:

I am the Fred S. Larson who bought those apples from Mr. Jebavy in Ludington. I bought them on an order bill of lading.

Q. The telegraph operator, when you confirmed the order, made a mistake in your name and instead of Fred S. Larson, he made it Fred M. Larson?

A. He didn't make any mistake, no. F. M. Larson is my sixteen year old daughter. I used her name. I used that initial. I didn't ask her consent. I simply bought the apples in her name. I sold [fol. 8] those apples out of a car and delivered them to different customers, and collected the money for them. I didn't give her any of the proceeds of those apples. When the car arrived it was in the same condition as it was when it was shipped. The doors were open about that wide (indicating) and cleated. I checked out short 1,200 or 1,500 pounds; something like that. Including Sunday, it took about four days to unload that car.

Q. How did you move them out of the car?

A. We put them in baskets and carried them out. I hired a draymen with an automobile truck. I wasn't there all the time while they were moving those apples. I was there from the time that we opened the car until the summons was served.

Q. Did you lock up the car nights?

A. I locked it.

Q. Did you have a watchman there?

A. No.

Q. You just simply locked it?

A. Yes.

Q. And left it standing there?

A. Yes.

Q. When you first started to unload that car was the last car here?

A. I don't recollect whether it was the first or second. I know that the car was shifted around during the time it was there.

[fol. 9] I bought the apples in the name of F. M. Larson without her knowledge or consent, so that, as a matter of fact, it was my transaction and not hers. I was the owner of those apples.

SHOVE, BRIGHAM W., station agent of the garnishee defendant, sworn on behalf of the plaintiff, under Section 12,554, Comp. Laws, 1915, testified as follows:

Q. Now, Mr. Shove, when the garnishee summons was served upon you, at the time of the service, they were unloading and had been unloading for some time?

A. Yes sir. They started to unload about 8:15. I don't know the exact moment; it was about 8:15. At that time the car was the last car. I don't know what time it was moved. I don't watch every switch made in the yard. It must have been moved after they started to unload the apples; evidently, yes.

Plaintiff rests, subject to calling the court's attention to the recent case of Grand Rapids Show Case Company v. Postal Telegraph-Cable Company, 215 Mich., 30, 33, and to the fact that we seek to hold the garnishee on an interstate shipment under the federal law and not under the state law.

[fol. 10] VERDICT AND JUDGMENT

Thereupon both parties rested. It was thereupon stipulated and agreed in open court by and between counsel for the plaintiff and the garnishee defendant that no question of fact was involved in this cause and that the court may dispose of the same as a matter of law and direct a verdict for the party whom the court found entitled thereto. Whereupon the court directed a verdict in favor of the plaintiff and against the garnishee defendant for the sum of $678.75 damages and costs to be taxed, and directed judgment to be entered accordingly to which direction of said verdict and the entry of the judgment thereon, garnishee defendant, by its counsel, then and there duly excepted.

ORDER SETTLING BILL OF EXCEPTIONS

Because the said several matters herein set forth do not appear by the records of said cause I, the said circuit judge, before whom the said cause was tried, at the request of counsel, for plaintiff and after due notice to the adverse party, have settled and signed this bill of exceptions, which together with Plaintiff's Exhibits 1, 2, 3 and 4, contains all the testimony given and proceedings had upon the trial of said cause, and it is certified that it was necessary, in order to prepare said bill of exceptions, for plaintiff to procure a copy of the stenographic minutes of the official stenographer taken upon the trial of said cause; that so far as the testimony is set out in said [fol. 11] bill of exceptions by questions and answers it was deemed advisable to set out the same in that manner to a full understanding of the questions of law raised, and that the annexed assignment of

errors and Plaintiff's Exhibits 1, 2, 3 and 4, accompanied said bill of exceptions at the time the same was settled and signed.

Settled and signed, this 2nd day of June, A. D., 1924.

(Signed) George O. Driscoll, Circuit Judge.

I consent to the foregoing as the bill of exceptions in said cause.

(Signed) Solomon W. Patek, Attorney for Plaintiff.

In Circuit Court of Gogebic County

Assignments of Error

Now comes the said garnishee defendant, by Frank A. Bell, its attorney, and says that in the record and proceedings in said cause, in the direction of a verdict against the garnishee defendant the Chicago & Northwestern Railway Company, as garnishee defendant therein, and in the rendition and entry of a judgment upon such verdict, manifest errors have intervened, and to the injury and detriment of the said garnishee defendant, to-wit:

1. Because the judgment herein holds the carrier of an interstate shipment liable as a garnishee of one who was neither a con- [fol. 12] signor nor a consignee, but was a person to be notified of the arrival of the shipment on a C. O. D. order, interstate bill of lading, with whom the carrier had no contract of carriage, after the notify man had taken up the bill of lading, paid the freight charges and assumed control of the shipment.

2. Because while the shipment is an interstate shipment and the case is controlled by the decisions of the United States Supreme Court, the court has misconstrued and misapplied the Federal decisions, particularly the case of Mark Owen vs. Michigan Central Railway Company, 256 U. S. 427 (41 Supreme Court Reporter 554), and has erroneously held the carrier liable as a custodian after it has in fact parted with actual custody and actual control, which was not the fact in the Mark Owen case.

3. Because this is an action of garnishment commenced under Chapter 28 Compiled Laws of Michigan 1915, under which a garnishee is liable in a proceeding in garnishment only for goods, property or money in its possession or under its control, and under the undisputed testimony the garnishee defendant in this case had neither actual custody nor actual control, both of which were in the principal defendant when the writ of garnishment was served. The fact that the apples in question were in a railroad car, standing on the rails of the garnishee defendant company, gave it at most only a constructive possession which does not satisfy the law of garnishment.

[fol. 13] 4. Because the direction of a verdict against the garnishee defendant and in favor of the plaintiff, and the entry of a

judgment thereon again such garnishee defendant and in favor of the plaintiff, was and is, upon the undisputed and conceded facts in this case, contrary to law.

For which error aforesaid the garnishee prays that the determination and judgment of the circuit court for the county of Gogebic may be reversed and altogether held for naught, and that the cause be remanded with directions to render and enter judgment in favor of the garnishee defendant.

Frank A. Bell, Attorney for Garnishee Defendant.

In Circuit Court of Gogebic County

Exhibit 1 in Evidence

Map or plat, showing the location of the public delivery track located northerly of the freight warehouse of the garnishee defendant; the track upon which the car was located at the time of the service of the writ of garnishment, and the relation of such track to the freight warehouse of the defendant, also the distance from the terminus to the first switch easterly of such warehouse.

(Original attached to the return to the writ of error).

[fol. 14] Exhibit 2 in Evidence

Pere Marquette Railroad Company

Frank W. Blair, Dudley E. Waters, S. M. Felton, Receivers

Order Bill of Lading—Original

Shipper's No. —.
Agent's No. —.
A-288.

Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, at Ludington, Mich., Oct. 4, 1921, from —— —— the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that

every service to be performed hereunder shall be subject to all the conditions whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. In-
[fol. 15] spection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

Consigned to order of L. G. Jebavy

Destination, Ironwood; State of Mich.

Notify F. M. Larson

At Ironwood, State of Mich.

Route, P. M. Ferry to Manitowoc and Northwestern.

Car Initial, P. M., Car No. 50,136.

Description of articles and special marks—bulk apples, S. L. & C. Weight (subject to correction) 24,000.

Ventilated. Inspection allowed.

8:00 a. m. 10/8/21 (Paid Oct. 7, 1921, The Merchants & Miners State Bank, Ironwood, Mich.).

Received Oct. 4, 1921 (P. M. R. freight office, Ludington, Mich.)

L. G. Jebavy, Shipper.

C. J. Milliking, Agent, Per W.

(This bill of lading is to be signed by the shipper and agent of the carrier issuing the same.)

Endorsements

L. G. Jebavy

Conditions

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, [fol. 16] or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carriers' responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

EXHIBIT 3 IN EVIDENCE

Judgment rendered in the principal case of Alvin R. Durham Company, a corporation v. Fred S. Larson, alias Fred M. Larson, on the 30th day of November, 1921, and appearing on Journal 8 [fol. 17] of the circuit court for the county of Gogebic, page 103, for $1,099.97 damages and $25.10 costs; total $1,125.07.

EXHIBIT 4 IN EVIDENCE

a. Affidavit in garnishment.
b. Writ of garnishment.

STATE OF MICHIGAN,
County of Gogebic, ss:

THE CIRCUIT COURT FOR THE COUNTY OF GOGEBIC

In the name of the People of the State of Michigan to the sheriff of said County of Gogebic, Greeting:

Whereas, Alvin R. Durham Company, a corporation organized, existing and doing business under and by virtue of the laws of the state of Michigan, as plaintiff, has commenced a personal action, arising upon implied and express contracts, in the circuit court for said county of Gogebic, against Fred S. Larson, alias Fred M. Larson, as defendant, by summons, as appears by the files and records of said court, and the said plaintiff has filed in the office of the clerk of said court, the affidavit of Alvin R. Durham, secretary and treasurer and agent, of said plaintiff in said suit, stating in said affidavit, among other things, that affiant has good reason to believe and does believe, that Chicago & Northwestern Railway Company, a corporation engaged in and carrying on a general railway business in said county of Gogebic, has property, money, goods, chattels, [fol. 18] credits and effects in its hands and under its custody and control, belonging to the said principal defendant Fred S. Larson, alias Fred M. Larson, and that the said Chicago & Northwestern Railway Company, a corporation as aforesaid, is indebted to the said principal defendant; that said indebtedness is due; that said principal defendant is justly indebted to the said plaintiff upon such contracts in the sum of $1,094.00, over and above all legal set-offs; that said sum is now due and unpaid, and that he is justly apprehensive of the loss of the same unless a writ of garnishment issue

to the aforesaid Chicago & Northwestern Railway Company, a corporation as aforesaid.

Now, therefore, you are hereby commanded to warn and summon the said Chicago & Northwestern Railway Company, a corporation as aforesaid, to appear before the said court, at the court house in the city of Bessemer, in said county, on the 27th day of October, A. D., 1921, to make disclosure in writing, under oath, to be filed with the clerk of said court, touching the liability of said Chicago & Northwestern Railway Company, a corporation as aforesaid, as garnishee of the said Fred S. Larson, alias Fred M. Larson, the said principal defendant in said action as charged in the said affidavit, and that the said Chicago & Northwestern Railway Company, a corporation as aforesaid, from the time of the service upon it of this writ shall thenceforth pay no money and deliver no prop- [fol. 19] erty or effects to the said Fred S. Larson, alias Fred M. Larson, the said principal defendant in said action, until discharged.

And of this writ you shall make due return.

Witness the Hon. George O. Driscoll, circuit judge, and the seal of the said circuit court, at the city of Bessemer, in said county, this 8th day of October, A. D., 1921.

John Luxmore, Jr., Clerk, by Luther E. Sherman, Deputy Clerk. Solomon W. Patek, Attorney for Plaintiff. Business address: Bessemer, Michigan.

c. Disclosure usual form denying all liability.
d. Notice of demand for oral examination of garnishee.
e. Demand for oral examination of garnishee.

(Title of Court and Cause)

The above named garnishee defendant, Chicago & Northwestern Railway Company, a corporation, having heretofore filed its disclosure in this cause denying its liability as garnishee, therein, as charged in the affidavit filed therein, and in and by said disclosure set forth that it had no moneys, rights, credits, effects or property of any kind, nature whatsoever, in its possession, or under its control, at the time of the service of the writ, in this suit, upon said [fol. 20] company, due or belonging to said defendant, and was not indebted to said defendant, in any sum whatsoever, and is in no manner liable as a garnishee, and it appearing from the affidavits of Alvin R. Durham and Jules E. Mars, hereto attached and made a part hereof, that the averments in such disclosure are incorrect and untrue, comes now the said plaintiff, by Solomon W. Patek, its attorney, and demands an oral examination of said Chicago & Northwestern Railway Company, a corporation, and of Brigham W. Shove, its station agent at its Ironwood, Gogebic County, Michigan, station, of said garnishee defendant being a station along the line of said garnishee defendant within said county of Gogebic, and he being the agent and officer of said garnishee defendant, upon whom service of the writ of garnishment in said cause was had, having knowledge of the facts set forth in said affidavit for the

writ of garnishment herein, and those alleged in the affidavits of the said Alvin R. Durham and Jules E. Mars, such examination to be had before the Hon. George O. Driscoll, the judge of said court, in accordance with the provisions of the statute.

Dated October 18th, 1921.

Solomon W. Patek, Attorney for Plaintiff.

f. Affidavits of Alvin R. Durham and Jules E. Mars.

[fol. 21] g. Oral examination.

h. Stipulation.

(Title of Court and Cause)

In this cause it is hereby stipulated by and between the plaintiff and the garnishee defendant, by their respective attorneys, as follows:

1. That the hereto attached Exhibit 1, is a correct transcript of the proceedings had on the 22nd day of October, 1921, before the Hon. George O. Driscoll, the judge of said court, upon and in pursuance of plaintiff's demand for a personal examination of the garnishee and its officers and agents.

2. That the hereto attached Exhibit 2, signed or subscribed by either, the attorney for said garnishee defendant, or its station agent, Brigham W. Shove, and filed in said cause with the clerk of said court, and thereupon be treated for all uses and purposes as the testimony given on the said personal examination of said garnishee defendant, its officers and agents.

3. That the filing of said Exhibit 2, with the clerk of said court as aforesaid, completes the statutory issue between the said plaintiff and the said garnishee defendant in said cause, and that the statutory issue thus formed or created by plaintiff's affidavit in garnishment and the garnishee's disclosure, and personal examination stand for trial in said court, as provided by law, before the said court, or [fol. 22] jury, at the option of the garnishee defendant, without any other or further demand for trial thereof by either party.

Dated October 31st, 1921.

Solomon W. Patek, Attorney for Plaintiff. Frank A. Bell, Attorney for Garnishee Defendant.

i. Statement on personal examination of garnishee being the instrument designated Exhibit 2, in the foregoing stipulation.

(Title of Court and Cause)

On the 23rd day of May 1924, before the Honorable George O. Driscoll, circuit judge at chambers at Bessemer.

Present: Solomon W. Patek, for plaintiff; Julius J. Patek, of counsel; Frank A. Bell, for garnishee defendant.

Mr. Patek: You may make a statement. Maybe I will concede your statement to be the facts.

Mr. Bell: I don't care to take the time of the court making a statement unless you will concede my statement to be true. There is no use of my making a statement of facts unless it will be accepted.

Mr. Patek: If I know what your statement of facts is, maybe I will concede it to be true.

Mr. Bell: The facts, if your honor please, are briefly these: at 4 p. m. on October 7th, there came to the Ironwood station of the Chicago & Northwestern Railroad, a carload of apples. This car was [fol. 23] a Pere Marquette car numbered 50,136. It was shipped on an order bill of lading from Ludington, Michigan, a station on the Pere Marquette Railroad, via Manitowoc, and Chicago & Northwestern to Ironwood. The car, as I say, arrived in the Ironwood yard at 4 o'clock in the afternoon of the 7th day of October. This car was billed by L. G. Jebavy, shipper, to the order of L. G. Jebavy at Ironwood, notify Fred M. Larson. The next morning at 8 o'clock the defendant here, Fred S. Larson, I believe his name is, produced at the freight office of the railway company, the original order bill of lading, which had been stamped paid by the Merchants & Miners Bank of Ironwood, and he delivered that, as he was required to do under an order bill of lading, to the defendant company and paid the freight on the car, amounting to $116.16, accepted the shipment and gave to the garnishee defendant railway company his receipt for the same. This was at 8 o'clock in the morning. Possession of the car was immediately given to him. It was on a team track where he could drive to it for unloading, and he, Fred S. Larson, commenced unloading the car. I think Brother Patek's statement is correct that he had unloaded about one-quarter of the bulk of the apples, when at 9:45 in the morning, possession having been given him at 8 o'clock, the garnishee summons was served in this case. At that time the car had been in the possession of Fred S. Larson, the original bill of lading had been in our possession and the freight had been paid for one hour and 30 minutes, and that [fol. 24] being true, we filed a disclosure that there was nothing in our possession, because the apples had left our possession.

Mr. Patek: You will admit that the Manitowoc mentioned in the bill of lading is situated in the state of Wisconsin?

Mr. Bell: Yes.

Mr. Patek: You also admit that the defendant here is the same Larson?

Mr. Bell: No, we don't. We haven't notified F. S. Larson, because the order bill of lading was to notify F. M. Larson. But F. S. Larson was the man who produced the bill of lading and the man to whom we delivered the apples.

Mr. Patek: We accept Mr. Bell's statement as correct, except where he reaches the conclusions about the acceptance of the shipment or the delivery by or to the defendant of the car, or the apples. We accept his entire statement as the facts in the case, except where he reaches the conclusions that the defendant, Fred S. Larson, accepted the shipment or that the car, or apples, were delivered to Larson or were in the possession of Larson at the time of the making of the affidavit or the service of the writ.

IN CIRCUIT COURT OF GOGEBIC COUNTY

SHOVE, BRIGHAM W., called as a witness, being first duly sworn, testified as follows:

Direct examination.

By Mr. Julius J. Patek:

Q. Your name is Brigham W. Shove and you are the station [fol. 25] agent of the garnishee defendant, Chicago & Northwestern Railway Company, at its Ironwood, Michigan, station?

A. Yes, sir.

Q. When this car referred to arrived on October 7th, it was placed on the track northerly of the warehouse?

A. It was next morning.

Q. Was it placed at the terminus of this track or was there room for another car between that car and the terminus?

A. When it was first put in there it was placed at the final end.

Q. Was it moved afterwards?

A. Yes, sir. Sometime between 8 and 9 in the morning it was moved a little easterly.

Q. At the time of the unloading of this car by Mr. Larson are you sure there wasn't a car westerly at the terminus?

A. There was one after the second switch. The car of apples was put in there first; then it was taken out and another car placed in there and this car containing apples was the second car.

Q. And to place it at the place where the unloading took place, that was done at the second switching?

A. Yes, sir.

Q. How long did it take to unload that car, if you know?

A. I think he finished it on Columbus day, the 12th day of October, 1921.

[fol. 26] Q. About what time did they start to unload?

A. About 8:20 in the morning, I would say.

Q. And the papers were served upon you?

A. At 9:45 a. m., October 8th, the same morning they started to unload the car.

Q. Suppose you had moved that car westerly and moved it out and placed the car containing the apples upon the place where it was at the time of the unloading, and then you desired to utilize the space between the apple car and the terminus of the track, could you have put in another car without removing the apple car to the switch?

A. No, sir.

Q. It was necessary to move the car to the switch and let another car come in followed by the apple car?

A. That is on the supposition that I wanted to move that other car?

Q. Yes, I am proceeding on the supposition that you wanted to move that other car, or had to move it.

A. Yes.

All the rails are above the ground to the extent of their height. If this car was switched the truck could not have followed it up in the yard and the unloading would have to stop while we were switching. I did not say that we switched it, but if we did they would probably remain right in the car. Those in the car would either stop unloading and get out or stop unloading and ride in [fol. 27] the car. I have not testified that the car was switched. I have testified that when it was first put in there it was placed at the final end and then between eight and nine o'clock in the morning it was moved Easterly, switched about 200 feet more or less.

Cross-examination by Mr. Bell:

This car was spotted at the extreme end of what we call our team track for the reason that with bulk apples we always try to put it where it won't be molested again because they are always running down as you take them out. There was access to it there at that point by a team road. The car remained substantially in that position until it was unloaded. If it was switched for the purpose of spotting another car, or for any other purpose, it would take about 5 minutes, it might be but 3.

In Circuit Court of Gogebic County

Motion for Directed Verdict

At the conclusion of the testimony Mr. Patek moved the court to direct a verdict in favor of the plaintiff and against the garnishee defendant in the sum of $600 and accrued interest, such motion being based upon the record here made and upon the former decision of the Supreme Court in this cause.

[fol. 28] In Circuit Court of Gogebic County

II. Direction of Verdict

By the Court: The court, on the previous trial of this case, filed an opinion stating its views and conclusions. The Supreme Court has held that the conclusions of this court were erroneous in the previous case. The record being in substantially the same condition now as it was when passed upon by the Supreme Court, the facts being undisputed, the court feels bound, and is bound, to follow the decision of the Supreme Court, and the motion will be granted. Judgment will be entered in favor of the plaintiff and against the garnishee defendant in the sum of $678.75 damages, which includes interest, and the costs to be taxed.

In Circuit Court of Gogebic County

III. Judgment

Judgment was entered in usual form in favor of plaintiff and against the garnishee defendant for $678.75 damages, and costs $40.

IV. Stay Bond

Filed and approved by the court May 29, 1924.

[fol. 29] In Supreme Court of Michigan

[Title omitted]

Argument and Submission—Dec. 3, 1924

This cause coming on to be heard is argued by Mr. Walker for the plaintiff and by Mr. Bell for the defendant and is duly submitted.

[fol. 30] In Supreme Court of Michigan

Alvin R. Durham Company, Plaintiff and Appellee,

vs.

Chicago & Northwestern Railway Company, Garnishee, Defendant, Appellant; Fred M. Larson, Principal Defendant

Before the Entire Bench

Opinion—Filed Dec. 31, 1924

Bird, J.:

This case was in this court on a former occasion, and will be found reported in 224 Mich. 477. The question involved therein was whether, under a conceded state of facts, defendant railway company as garnishee defendant, had in its custody, control and possession a certain interstate shipment of apples.

The testimony admitted convinced the trial court that the railway did not have the custody, control or possession of the shipment and, therefore, directed a verdict in its behalf. On error in this court it was held, under the interpretation of section 5 of the uniform bill of lading, as appears in Owen v. Michigan Central Railway Company, (256 U. S. 427), that the railway did have the custody, control and possession of the interstate shipment, thereby reversing the conclusion of the lower court. The case has been retried in the trial court, and

a verdict directed for plaintiff in accordan
court. By writ of error the case has reac
likely to facilitate the removal of it to the
[fol. 31] The same questions are reargue
argued on its first appearance. There app
raised. We may dispose of the matter by
opinion that the interpretation given to s
of lading by Mr. Justice McKenna in Owe
way, supra, must determine the case adv
the Railway Garnishee.

The judgment is affirmed.

(Signed) John E. Bird, Geo. M.
Nelson Sharpe, J. H. Steere, Ho
Joseph B. Moore.

[File endorsement omitted.]

[fol. 32] IN SUPREME COURT OF

[Title omitted]

JUDGMENT—Dec. 31

The record and proceedings in this cau
this Court by Writ of Error, issued to the C
of Gogebic, and the same, and the matter
been seen and inspected and duly consi
appearing to this Court that in said reco
the giving of judgment in said Circuit Co
fore it is ordered and adjudged that the
Court for the County of Gogebic be and
things affirmed, and that the plaintiff do
its costs, to be taxed, and that it have exec

SUPREME COURT OF THE U

ORDER ALLOWING CERTIORARI—

The petition herein for a writ of certi
of the State of Michigan is granted. An
the duly certified copy of the transcript
which accompanied the petition shall be t
sponse to such writ.

dance with the holding of this
eached this court again, quite
the Federal Supreme Court.
gued in counsel's briefs as were
appears to be no new questions
by saying we are still of the
section 5 of the uniform bill
wen v. Michigan Central Rail-
adversely to the contention of

M. Clark, John S. McDonald,
Howard Wiest, Grant Fellows,

OF MICHIGAN

ed]

31, 1924

cause having been removed to
e Circuit Court for the County
tters in error assigned, having
nsidered by the Court, and it
ecord and proceedings, and in
Court there is no error, there-
the judgment of said Circuit
nd the same is hereby in all
do recover of the defendant,
execution therefor.

A

UNITED STATES

—Filed May 25, 1925

ertiorari to the Supreme Court
And it is further ordered that
ript of the proceedings below
be treated as though filed in re-